

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
FCC Seeks Comment on Adopting)	
Egregious Cases Policy for)	GN Docket No. 13-86
Indecency Enforcement)	

**COMMENTS OF SUN SOUNDS OF ARIZONA,
AN AUDIO INFORMATION SERVICE
Part III**

SUN SOUNDS of ARIZONA

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should guide the Commission in recognizing that radio or TV licensees who broadcast print-based information, provided to the station by a radio reading or audio information service should not be considered actionable indecency or profanity and exempt from sanctions. Failure to do so will perpetuate the present chilling effect which causes radio and TV licensees to refuse to carry radio reading and audio information services, a *de facto* prior restraint.

B. Under the Commission’s Contextual Analysis, Audio Information Service Is Neither Indecent Nor Profane and Should Be Exempted From Indecency Enforcement.

The Sun Sounds weekly schedule for the month of January 2012 is attached as Exhibit 2. This document illustrates that at least 80 to 85 percent of the print materials read to Sun Sounds members each week consists news and public affairs, primarily in the form of newspapers and magazines, supplemented by a few hours each day of books and short stories. That month’s programming schedule – typical of Audio Information Services – fits the description and definition of a bona fide “news programming” context in the Commission’s analysis of both the fleeting expletive uttered by an interview subject during the CBS morning news program, “The Early Show,”⁴¹ and “the repetitious use of coarse words” by mob boss John Gotti broadcast by NPR.⁴²

The Commission’s deference to news programming has deeper roots. In the *Peter Branton* letter decision, the Commission explained that would not consider the inclusion of the Gotti wiretaps in the NPR news story actionably indecent because:

the program segment, when considered in context, was an integral part of a bona fide news story . . . [and] we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners.⁴³

⁴¹ *Order on Remand*, 21 FCC Rcd at 13,327, ¶ 71.

⁴² *Peter Branton*, 6 FCC Rcd at 610.

⁴³ *Id.*

Some years later, in the Indecency Policy Statement, the Commission confirmed that “[e]xplicit language in the context of a bona fide newscast might not be patently offensive.” These considerations were re-stated in the 20XX Omnibus Order, in which the Commission again “recognized the need for caution with respect to complaints implicating the editorial judgment of broadcast licensees in presenting news and public affairs programming, as these matters are at the core of the First Amendment’s free press guarantee.”⁴⁴ In that Order, the Commission dismissed an indecency complaint regarding material aired on NBC’s “The Today Show in order to “exercise caution with respect to news programming.”⁴⁵

The Commission exercised that same caution in [2006] in ruling on an indecency complaint concerning The CBS morning news magazine program, “The Early Show.” While warning that “there is no outright news exemption from our indecency rules,”⁴⁶ the Commission re-affirmed its “commitment to proceeding with caution in our evaluation of complaints involving news programming.”⁴⁷ This “imperative” need for caution with news and public affairs programming rests on two core principles of the Commission’s indecency policies. These are, the Commission stated, “the important First Amendment interests at stake as well as the crucial role that context plays in our indecency determinations.”⁴⁸ Sun Sounds submits that the print material read by its volunteers that is broadcast is entitled to the same deference for the same reasons. Since the context in which it is broadcast is primarily one of news and public affairs, the deference required by the First Amendment requires caution while the delivery of the

⁴⁴ *Omnibus Order*, 21 FCC Rcd at 2668 ¶ 15.

⁴⁵ *Id.* at 2717 ¶ 218.

⁴⁶ *Order on Remand*, 21 FCC Rcd at 13,327, ¶ 71.

⁴⁷ *Id.*

⁴⁸ *Id.*

content in itself, as the Commission pointed out in *The Early Show* and Peter Branton analysis, is not “patently offensive.”

Under the Commission’s policy for assessing whether particular broadcast material is indecent or profane, the Commission must make at least two fundamental determinations before it may find the material to have violated its policies.⁴⁹ First, the material in question “must describe or depict sexual or excretory activities or organs.”⁵⁰ Second, the material “must be *patently offensive* as measured by contemporary standards for the broadcast medium.”⁵¹ In all cases, the context in which the allegedly offending material is presented is critical. Applying this analysis to the print material read to print-disabled listeners by volunteers for Sun Sounds and other Audio Information Services, results in the inevitable conclusion that the this material should be deemed neither indecent nor profane.

Applying this analysis to Audio Information Service broadcasts, it is entirely possible that the words “fuck” or “shit” (or some variation thereof) might appear in a magazine or book read by a volunteer. A book or short story might contain a scene describing sexual organs or activities. That is why the print-impaired adults served by Sun Sounds are channeled to read, after 10 pm and overnight, books that sighted adult citizens can read any time of day.⁵² In print form, these books and short stories, none of which would be deemed “obscene,” would enjoy

⁴⁹*In the Matter of Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8002 (2001) [hereafter, “Indecency Policy Statement”].

⁵⁰*Id.*

⁵¹*Id.*

⁵² Sun Sounds notes that, should it read these Comments aloud to its members, it would have to do so after 10 pm, because the F-word and S-word have been used without being blocked out, although sighted Arizona citizens can read the Comments in full online at the FCC’s website.

absolute First Amendment protection from government-enforced prior restraint, channeling, or penalties.

As pointed out above, books and short stories are only a small segment of the print content that is read over the air by Sun Sounds volunteers. The great majority of the content is news and public affairs. In response to criticism that “The Early Show” interview with contestants from the CBS program “Survivor” would not be considered hard-hitting news, the Commission correctly pointed out, first, that the program is “produced by CBS News and addressed a variety of other topics that morning, and that the overall context of this multi-hour programming included news reports on such other topics as terrorism, an interview with a candidate for federal office, and an international news story about the death of foreign leader. All of these, the Commission concluded, “clearly fall under the rubric of news programming.”⁵³ Furthermore, The Early Show is similar to “The Today Show,” which had also been deemed a news and public affairs program in an earlier Commission decision. These factors caused the Commission to “defer to CBS’ plausible characterization of its own programming” in the “Survivor” interview as news.

The second component of the Commission’s indecency analysis requires a determination of whether the material that was broadcast should be deemed patently offensive as measured by contemporary community standards for the broadcast medium.⁵⁴ In making this determination, the Commission has repeatedly stressed that “the *full* context in which the material appeared is critically important.”⁵⁵ The three principal factors that have been deemed significant to this

⁵³ *Order on Remand*, 21 FCC Rcd at 13,327-28, ¶ 72.

⁵⁴ *Indecency Policy Statement*, 16 FCC Rcd at 8002; *Omnibus Order*, 21 FCC Rcd at 2667; *Order on Remand*, 21 FCC Rcd. at 13,313, ¶ 15.

⁵⁵ *Indecency Policy Statement*, 16 FCC Rcd. at ¶ 9; *Order on Remand*, 21 FCC Rcd at 13,313, ¶15].

contextual analysis are “(1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length the descriptions; and (3) whether the material panders to, titillates or shocks the audience.”⁵⁶

In the *Peter Branton* letter decision, the Commission characterized the Gotti material as “the repetitious use of coarse words” which “is objectionable to many persons,” recognizing that the complainant “personally may have been offended by the use of expletives” during that segment. “Nonetheless,” the letter stated:

we do not find the use of such words in a legitimate news report to have been gratuitous, pandering, titillating or otherwise ‘patently offensive,’ as that term is used in our indecency definition. In reaching this determination, we note that the program segment, when considered in context, was an integral part of a bona fide news story concerning organized crime, and that the material prompting your complaint was evidence used in a widely reported trial. See *Infinity Broadcasting*, 3 FCC Red at n.31. These surrounding circumstances persuade us that the use of expletives during the Gotti segment does not meet our definition of broadcast indecency. In reaching this conclusion, we note that we traditionally have been reluctant to intervene in the editorial judgments of broadcast licensees on how best to present serious public affairs programming to their listeners.⁵⁷

Likewise, with respect to the fleeting expression “bullshitter” in the context of “The Early Show,” the Commission determined on remand that it had not, in the Omnibus Order, given “appropriate weight to the nature of the programming at issue (i.e., news programming).”⁵⁸ The Commission’s explanation of this reversal is similar to the reasoning quoted above:

Turning to the specific material that is the subject of the complaint, we can certainly understand that viewers may have been offended by Ms. Tanner’s coarse language. Nevertheless, given the nature of her comment and our decision to defer to CBS’ characterization of the program segment as a news interview, we conclude, regardless of whether such language would be actionable in the context of an entertainment program,

⁵⁶ *Id.*

⁵⁷ *Peter Branton*, 6 FCC Red at 610.

⁵⁸ *Order on Remand*, 21 FCC Red at 13,327-28, ¶ 72.

that the complained-of material is neither actionably indecent nor profane in this context. Accordingly, we deny the complaint.⁵⁹

Sun Sounds characterizes the print material that is read by its volunteers and broadcast by KBAQ and other stations as print; it also characterizes its content as news and public affairs programming. It presents this programming in the overall context of a 24-hour schedule that includes a relatively-minor amount of print material read from books, both fiction and non-fiction. Sun Sounds is not alone in its characterization of this material as print. As noted above, former-Chairman Genachowski characterized audio information service content the same way. This material is presented by volunteers reading aloud, in a manner that not even the most dedicated member of the Parents Television Council would be likely to consider a “pandering” or “titillating” manner.

Furthermore, although the medium for transmission may be over-the-air broadcasting, it is significant to this analysis that Audio Information Services content is not aimed at a general audience but, rather, is focused on a narrow and specific subset of listeners in an area. Although an HD broadcast of Audio Information Service programming could theoretically be heard by anyone with an HD receiver, it is unlikely that there are many children out there trolling HD radio in the hope of hearing a dirty word or two in an AIS broadcast. The fact that Audio Information Services CAN be accessed by the public does not mean that we WILL be accessed by the public.

As practical matter, no individual who is physically able to pick up and scan a newspaper to find the articles he or she wishes to read would deliberately tune in to a radio station which will, over the course of two hours perhaps read the few articles for which he or she bought the

⁵⁹*Id.* at 13,328, ¶ 73,

paper for in the first place. A visually impaired person has no choice but to wait for the service to read the paper in accordance with a schedule, waiting for articles he or she might prefer, but a sighted person would almost certainly lose patience long before any fleeting expletives might be heard.

Similarly, in order to keep within the limited copyright exemption available for reading print over the air, Audio Information Services only promote their service to those community members who need it. Not once has a reading service bought a billboard on a busy highway to get more listeners from the general public. It would not only nullify our copyright exemption – it would be hugely expensive for no real return.

The overall context is reading services for the blind, visually-impaired, and print-disabled adults is one of earnest caring people, some of whom read better than others, but all of whom believe in their mission to bring print to the print-disabled. This is not a context in which reading is intended to titillate or pander or deliberately shock the listening members of the service. Consideration of the full context of the content and transmission of Audio Information Services would completely satisfy the Commission’s contextual analysis that the material being broadcast by Sun Sounds and its fellow AIS organizations to this audience is not and will not be deemed, as a matter of policy, actionably indecent or profane, even when broadcast over HD. Sun Sounds urges the Commission, applying the principles and analysis employed in the *Peter Branton* and “The Early Show” complaints, to deem the context of Audio Information Service programming exempt from indecency and profanity enforcement actions, as a matter of Commission policy.

An overall policy determination that print content provided by audio information services will be exempt from enforcement action will serve the public interest because it will remove a significant barrier to Audio Information Services becoming more available to persons with print

disabilities. The barrier in question is the chilling effect from the Commission's indecency policy enforcement that has caused so many broadcast stations to deny carriage for these services. At the present time, although approximately hundreds of thousands of American citizens are able to receive one of these services, there are still "huge gaps in national coverage" as referenced by the *Waldman Report*.

Chapter 24, People With Disabilities, of that *Report* is attached to these Comments as Exhibit 3, because it does such a good job of explaining why, even with the enactment of the CVAA, broadcast media today remains the most accessible format for the great majority of persons who are print-disabled to receive audio information services. This is due to the expense, intricacies, lack of user-friendliness of some of the newer media, thus leaving broadcast as the principle form of access. Additionally, interference from HD radio channels has vastly reduced the quality of SCA-based transmissions, while the equipment manufactured for SCA reception is often of poor quality.

As discussed above in section **I. B. Technological Issues**, the *Report* also points out that, unfortunately, "many radio reading services have been unable to migrate to HD radio "because they have not been able to convince their FM main channel hosts to carry their services over digital audio broadcasting radio stations, despite the great bandwidth available to these stations." The resistance, in part, stems from the chilling effect of Commission indecency policy enforcement. These stations are concerned because audio information services "do not typically edit or censor the printed page read aloud for listeners,"⁶⁰ just as those printed pages would not be edited or censored before being read by sighted persons.

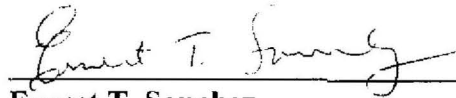
⁶⁰ *Waldman Report* at 258.

If audio information services are to thrive and grow, serving the many thousands of persons who presently lack such access, if the award-winning Narrator HD radio is to achieve its projected value for persons with print disabilities, then radio and television stations will have to become more willing to broadcast audio information service programming. Without the proposed policy change exempting these services from indecency enforcement, this promising new HD-based technology will remain not much more than a promise for the nearly all print-disabled listeners. Sun Sounds and its members urge the Commission to give serious consideration to the proposed determination that Audio Information Services deemed exempt from indecency and profanity enforcement actions as a matter of Commission policy.

Respectfully submitted,

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